IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.157 OF 2004

Central Bureau of Investigation,
Thru' U.K.Goswami, Dy.S.P.,
C.B.I., NEW DELHI. ...Petitioner

Versus

1.Abdul Karim Ladsab Telgi (A-23),
(Presently lodged in Central Jail,
Bangalore, Karnataka)

2.Manoj Ramesh Mehta (A-43)

3.Dilip Pandurang Kamath (A-44)

4.Anil Umrao Gote (A-45)

5.Abdul Azim Ladsab Telgi (A-46)

6.Abdul Rashid Sikandersab Kulkarni (A-49)
(Respondents Nos.2 to 6 are presently
lodged in Yerwada Central Prison, Pune).

7.State of Maharashtra ...Respondents

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Mr.V.T.Tulpule with Mr.R.B.Thakare and
Mr.A.M.Chimalkar for Petitioner.

Mr.Harshad Nimbalkar for Respondent No.1.

Mr.P.M.Pradhan for Respondents 2, 3, 5 & 6.

Mr.A.P.Mundargi for Respondent No.4.

Mr.D.R.More, A.P.P. for Respondent No.7.

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CORAM: A.M.KHANWILKAR, J.

OCTOBER 12, 2004.

ORAL ORDER :

1. Heard Counsel for the parties.

2. Rule. Rule made returnable forthwith, by consent. Mr.Nimbalkar waives notice for Respondent No.1. Mr.Pradhan waives notice for Respondents 2, 3, 5 & 6. Mr.Mundargi waives notice for Respondent No.4. Mr.More, A.P.P. waives notice for Respondent No.7.

3. As short question is involved, the matter is taken up for final disposal forthwith, by consent.

4. This Petition under Section 482 of the Code of Criminal Procedure, 1973 read with Article 227 of the Constitution of India takes exception to the order passed by the Special Judge under Maharashtra Control of Organised Crimes Act, 1999, Pune, dated December 12, 2003 below Exhibit 156 in Special Case No.2 of 2003. The State of Maharashtra, through Superintendent of Police,

S.I.T. Pune, had filed application before the Special Judge, being Exhibit 156, praying that they may be permitted to record the voice samples of the Respondents 1 to 6 herein in the jail premises itself, where the said Respondents were lodged and further direct the said Respondents to co-operate in that behalf. The Respondents 1 to 6 have been named as accused Nos.23, 43, 44, 45, 46 and 49 respectively in offence relating to "stamp scam case" registered vide C.R.No.135 of 2002 at Bund-Garden Police Station, Pune. The said application was resisted by the Respondents 1 to 6 herein, and the Special Judge, upon considering the rival submissions, rejected the same by the impugned Judgment and Order. The present Petition takes exception to the said Order.

5. This Petition was initially filed by the State of Maharashtra. However, during the pendency of this Writ Petition, investigation in respect of the said case has been taken over by the Central Bureau of Investigation, pursuant to order passed by the Supreme Court of India. In that backdrop, the Central Bureau of Investigation moved a formal

application before this Court for transposing them as Petitioner, and for making the State of Maharashtra as party Respondent No.7. The said application was allowed by this Court by consent, consequent to which, the present Petition is now espoused by the Central Bureau of Investigation.

6. Mr.Tulpule appeared for the Petitioner. According to him, the request made in the application was simpliciter to obtain voice sample so as to enable the investigating agency to identify the voice of the concerned accused and compare the same with the tape-recorded conversation which has been made available during the investigation of the case. According to him, the Court below has clearly misdirected itself in rejecting the application for reasons amongst others, that similar request made by Karnataka Police earlier was rejected, as the Court cannot compel the accused for giving a voice sample; that there are voice experts, who can easily concoct or tamper the voice of any person; that accused can also change their voice if they are compelled to give voice sample; that it will be difficult for

the expert to record the voice sample under compulsion; that the Respondents accused were not ready and willing to give their voice samples to verify the alleged intercepted telephonic conversation between main accused A.K.L. Telgi and the Respondents herein, adverse inference can be drawn that the same intercepted telephonic conversation is between accused A.K.L. Telgi and the Respondents, for which reason, it was not necessary for the prosecution to establish the identity of the voice recorded in the C.Ds. by the scientific and expert evidence obtaining the voice samples of the accused Respondents. Moreover, the Court below has rejected the prayer inspite of the finding that obtaining such voice sample would not amount to testimonial compulsion, as the accused were unwilling to give their voice sample. According to Mr.Tulpule, none of the reasons which have weighed with the Court below are appropriate or can be sustained, while considering the application as was made for the limited purpose of obtaining sample voice for identification of the voice of the concerned accused to be compared with in the intercepted telephonic conversation. He has

relied on the decision of the Apex Court reported in **AIR 1961 SC 1808 in the case of State of Bombay vs. Kathi Kalu Oghad** to support his submission and urged that the relief as prayed in the application preferred before the lower Court, ought to have been granted in its entirety, for requiring the accused to lend their sample voice was in no way different from requiring them to give finger prints, thumb impression, foot prints and the like.

7. Per contra, Mr.Pradhan for the Respondents would contend that there is no provision under any law, which permits grant of such a relief by the Court during the pendency of the trial and in any case, not adverted to in the subject application. It is further contended that requiring the concerned accused to lend his voice sample would amount "to be a witness against himself". On this premiss, it is argued that in such a case, the rigours of Article 20(3) of the Constitution of India will spring into action, as a result of which, the course suggested by the Petitioner cannot be permitted. It is then contended that for the same relief, another application was filed on

behalf of Assistant Commissioner of Police and Investigating Officer, Stampit, Bangalore, who was investigating into similar offence, allegedly committed by the same accused in the State of Karnataka, and that application was rejected by the same Court, which order has been allowed to become final. Accordingly, it is argued that, it was not open to entertain successive application for the same relief though filed by another investigating agency. He further contends that the stated telephonic conversation has been recorded during the investigation in relation to alleged offence registered in the State of Karnataka and while the main accused was in jail in that State. It is argued that the said recorded cassettes and tape conversation cannot be used in some other case investigated by the Petitioner, which is registered at Pune in Maharashtra. Mr.Pradhan, to buttress his argument, placed reliance on the decision of the Apex Court reported in **1978 SC 1025 in the case of Smt.Nandini Satpathy v. P.L.Dani & Anr. and A.I.R. 1973 SC 1196 in the case of Ramanlal Bhogilal Shah & Anr. v. D.K.Guha & Ors.** to contend that directing the Respondents to lend

their voice sample would amount to testimonial confession, which will be impermissible because of the mandate of Article 20(3) of the Constitution of India. He further relied on the decision of the Kerala High Court reported in **1996 Cri.L.J. 1302 in the case of V.Gopalakrishnan Nayanar & Anr. v. K.V.Sasidharan Nambiar & Anr.** to contend that it is impermissible for the Court to direct the accused to produce any document, and even the provisions of Section 91 of the Criminal Procedure Code, 1973 cannot be pressed into service inspite of the expansive language of the said provision. He submits that on the principles underlying the said decision, even the request of the Petitioner for directing the Respondents to lend their voice samples cannot be accepted, much less, when the Respondents were unwilling to do so.

8. Mr.Nimbalkar for Respondent No.1 adopts the argument of Mr.Pradhan and further submits that even assuming that it is open to the Court to permit collection of voice sample of the accused, even in that case, it will have to be permitted only if the accused voluntarily submitted to such

examination. He submits that even in the case of recording of confessional statement, as permitted under Section 24 of the Evidence Act, the statement cannot be recorded under duress or by force, but only if the accused was willing to submit to such recording. On the above submissions, Counsel for the Respondents would contend that the present Petition is devoid of merits.

9. Having considered the rival submissions, to my mind, the moot question that needs to be addressed is: whether requiring the accused to lend his voice sample tantamounts "to be a witness against himself"? For, it is only if this Court was to accept the contention canvassed on behalf of the Respondents that lending of voice sample has the trappings of "to be a witness against himself", the Court would lean to hold that compulsory taking of voice sample of the accused is impermissible because of the mandate of Article 20(3) of the Constitution of India. On examining the decisions cited at the Bar as referred to above, to my mind, the question can be straightaway answered by relying on the dictum of the Constitution Bench of

the Apex Court in the case of **State of Bombay vs. Kathi Kalu Oghad (Supra)**. The Apex Court in Paragraph 11 of the said decision has observed that a person is said "to be a witness" when he imparts knowledge in respect of relevant facts, by means of oral statements or statements in writing of personal knowledge of the facts to be communicated to a Court or to a person holding an enquiry or investigation. It is further held that a person is a witness to a certain state of facts which has to be determined by a Court or Authority authorised to come to a decision, by testifying to what he has seen or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. In the same Judgment, the Apex Court has observed in Para 10 that "to be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification.

In this Judgment, the Apex Court has noted the subtle distinction between the situation where a person can be said to be a witness against himself, attracting the rigours of Article 20(3) of the Constitution of India and the situation such as requiring the accused to furnish evidence only for the limited purpose of ascertainment of his identity. In the latter case, the Apex Court has held that evidence furnished by the accused for his identification such as specimen handwriting or signature or finger impressions are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. Those are only materials for comparison in order to lend assurance to the Court that its inference on other pieces of evidence is reliable. It is further observed that such materials neither fall in the category of documentary evidence or oral evidence, but it is in the nature of material evidence which is outside the limit of "testimony". It is apposite to reproduce the discussion of the Apex Court in Paragraphs 10 to 12 of this decision, which deals

with this aspect in extenso. The highlighted portion of this extract, in my opinion, would answer the point in issue. The same read thus:

> "(10) "To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm, or foot or fingers or specimen writing of exposing a part of the body by an accused person for purpose of identification. "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution makers for the simple reason that- though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject - they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution makers were aware of the existing law, for example, S.73 of the Evidence Act or Ss.5 and 6 of the Identification of Prisoners Act (XXXIII of 1920). Section 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken, if he is satisfied that it is expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure to do

so : ‘Measurements’ include finger impressions and foot-print impressions. If any such person who is directed by a Magistrate, under S.5 of the Act, to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or photographs, it has been declared lawful by S.6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly S.73 of the Evidence Act authorises the Court to permit the taking of finger impression or a specimen handwriting or signature of a person present in Court, if necessary for the purpose of comparison.

(11) The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not ‘to be a witness." "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the fact to be communicated to a court or to a person holding an enquiry or investigation. A person is said ‘to be a witness’ to a certain state of facts which has to be determined by a court or authority authorises to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma’s case, 1954 BCR 1077 : (AIR 1954 SC 300) that the prohibition in cl.(3) of Art,20 covers not only oral testimony given by a person accused of an offence but also his written statements

which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of S.139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents. In our opinion, therefore, the observation of this Court in Sharma's case, 1954 SCR 1077 : (AIR 1951 SC 800) that S.139 of the Evidence Act has no bearing on the connotation of the word 'witness' is not entirely well-founded in law. It is well established that cl.(3) of Art.20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person

is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. he can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, inspite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. This, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.

(12) In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'."

(emphasis supplied)

. It will be appropriate to refer even to Paragraph 16 of this decision, which articulates the conclusion of the Court, which reads thus:

> "(16) In view of these consideration, we have come to the following conclusions :-
>
> (1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
>
> (2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not ‘compulsion’.
>
> (3) <u>‘To be a witness’ is not equivalent to ‘furnishing evidence’ in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.</u>
>
> (4) <u>Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showings parts of the</u>

> body by way of identification are not included in the expression 'to be a witness'.
>
> (5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.
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> (6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.
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> (7) To bring the statement in question within the prohibition of Art.20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made".
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> (emphasis supplied)

10. It is relevant to point out that although the minority Judgment has assigned separate reasons, but has agreed with the conclusion reached by the majority that furnishing of such evidence will not infringe Article 20(3) of the Constitution of India, as can be discerned from the exposition in Paragraph 35 of the same decision.

11. Indubitably, requiring the accused to lend his voice sample for the limited purpose of identification of his voice so as to compare the same with the tape-recorded telephonic conversation, is neither requiring him to impart knowledge in respect of relevant facts, by means of oral statements or statements in writing of his personal knowledge of the facts to be communicated to a Court or to a person holding an enquiry or investigation. Besides, the accused will not be called upon to state on any of the state of facts which will have to be determined by a Court or authority authorised to came to a decision, by testifying to what he has seen, or something he has heard, which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of the matters in controversy. Accordingly, applying the principle underlying the statement of law expounded in **State of Bombay vs. Kathi Kalu Oghad (Supra)**, in my opinion, the requirement of lending voice sample to the investigating agency by the concerned accused for the purpose of identification of their voice cannot infringe Article 20(3) of the Constitution

of India, as it is outside the limit of "testimony" much less, "testimonial compulsion". Be that as it may, as is well established that tape-recorded conversation is admissible in evidence, provided, it fulfils certain conditions. The Apex Court in the case of **R.M.Malkani v. State of Maharashtra reported in (1973) 1 SCC 471** in Paragraph 23 has observed thus:

> "23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr.Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence."
>
> (emphasis supplied)

. One of the precondition for admissibility of tape-recorded conversation is identification of the voice. If identification of the voice is the quintessence for the admissibility of the tape-recorded conversation, it is preposterous to suggest that it is not open to the investigating agency to require the concerned accused to lend his voice sample for the purpose of identification of the voice in the tape-recorded conversation.

12. Indubitably, with the advancement of Science and Technology, identity of a person with the aid of finger prints, palm impression, thumb impression, foot marks, blood sample, D.N.A. test, specimen of handwriting, signature or exposing a part of the body or the like, can be established. As observed by the Apex Court in **Malkani's case (Supra),** a contemporaneous tape-record of a relevant conversation is a relevant fact admissible under Section 8 of the Evidence Act. The same is res gestae and also comparable to a photograph of a relevant incident, admissible under Section 7 of the Evidence Act. Just as handwriting and signature are associated with an individual or his

personal trait, even the voice of a person is his personal trait. World over, voice identification is employed by police during investigation for identifying individuals by the time, frequency, and intensity of their speech-sound waves. A sound spectrograph is employed to record these waves in the form of a graph that may be compared to graphs of other individuals and differentiated. For the most accurate results from the spectrographic voice identification method, a professional examiner (1) will require the original recordings or the best quality re-recordings if the original is not available; (2) will perform a critical aural review of the suspect and known recordings; (3) will produce sound spectrograms of the comparable words and phrases; (4) will produce a comparison recording juxtaposing the known and unknown speech samples; (5) will evaluate the evidence and classify the results into one of five standard categories [1-positive identification, 2-probable identification, 3-positive elimination, 4-probable elimination, and 5-no decision]. The final decision is reached through a combined process of aural and visual examination. The spectrographic

method of voice identification is a process that interweaves the visual analysis of the sound spectrograms with the critical aural examination of the sounds being viewed. No longer are voices compared on the basis of a limited group of key words. Today's aural/spectrographic voice identification method takes advantage of the latest in technological advancements and interweaves several analysis into one procedure to produce an accurate opinion as to the identity of a voice. This modern technique combines the experience of a trained examiner performing the visual analysis of the spectrograms and aural analysis of the recordings with the use of the latest instruments modern technology has to offer, all in a standardised methodology to assure reliability. Proper presentation and explanation of the research pertaining to spectrographic voice identification analysis will allow the Court to better understand the accuracy and reliability of the spectrographic voice identification method. When the research is properly presented, the studies show that properly trained individuals, using standard methodology, produce accurate results. It is not necessary for

me to dilate on the issue as to whether the spectrograph analysis to be done or as done, would be accurate and reliable, for it will be a matter of evidence to be established by the experts on that subject. Suffice it to observe that as voice is associated with an individual or his person and a personal trait, if scientific analysis for identification of voice is possible then, there is no inhibition in taking the voice sample of a person on the basis of which, his identity in the tape-recorded telephonic conversation can be established.

13. A priori, the argument canvassed on behalf of the Respondents will have to be negated. The argument proceeded on the premiss that requiring the accused to lend voice sample is in the nature of testimonial compulsion. If this argument were to be accepted, on the same analogy, even the identification parade conducted during the investigation to establish the identity of the accused would become questionable. As mentioned earlier, this argument clearly overlooks the subtle distinction noted by the Apex Court in **State of**

Bombay vs. Kathi Kalu Oghad (Supra) about "to be a witness against himself" and "to furnish evidence to lend support for the purpose of identification of the person concerned". The decisions of the Apex Court pressed into service on behalf of the Respondents mainly deal with the aspect of what amounts to "testimonial compulsion". As held earlier, requiring the Respondents to lend their voice sample, does not amount to testimonial compulsion and for that reason, it is not necessary to dilate on the said decisions. Even the Judgment of the Kerala High Court pressed into service on behalf of the Respondents, is of no avail for deciding the point in issue.

14. That takes me to the technical plea raised on behalf of the Respondents that the application as filed before the Court below makes no reference to any express provision of the Law under which such relief could be granted. As held earlier, it is open to the investigating agency for the purpose of ascertaining identification of the voice of accused to require the accused to lend his sample voice. Moreover, reference can be usefully made to

the provisions of the Identification of Prisoners Act, 1920. This Act was especially intended to make provisions regarding authorising the taking of measurements and photographs of convicts and others, so as to record or make note of the identity of such persons. Section 5 of the Act as applicable to the State of Maharashtra, reads thus:

> **"5.Power of Magistrate to order a person to be measured or photographed.**-If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements or photograph to be taken, be may make an order to the effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:-
>
> . Provided that no order shall be made directing any person to be photographed except by the District Magistrate, Sub-Divisional Magistrate, a Magistrate of the first class and Metropolitan Magistrate.
>
> . Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

. It provides that when the Magistrate is

satisfied, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, it is expedient to direct any person to allow his "measurement" or "photographs" to be taken. Such a direction can be issued by the concerned Court, if pressed on behalf of the investigating agency. In the first place, as held by the Apex Court in **Malkani's case (Supra)**, tape-recorded conversation is comparable to photograph of the relevant incident. Be that as it may, the expression "measurements" occurring in Section 5 has been defined in Section 2(a), which reads thus:

> 2.Definitions.-In this Act.....
> (a) "measurements include finger-impressions and foot-print impressions".

. The said expression is an inclusive term, which also includes finger-impressions and foot-print impressions. Besides, the term measurement, as per the dictionary meaning is the act or an instance of measuring; an amount determined by measuring; detailed dimensions. With the development of Science and Technology, the voice sample can be analysed or measured on the

basis of time, frequency, and intensity of the speech-sound waves so as to compare and identify the voice of the person who must have spoken or participated in recorded telephonic conversation. The expression "measurements" occurring in Section 5, to my mind, can be construed to encompass even the act undertaken for the purpose of identification of the voice in the tape-recorded conversation. Such construction will be purposive one without causing any violence to the said enactment, the purpose of which was to record or make note of the identity of specified persons. On this reasoning, the Court below could have legitimately granted the relief as prayed by the investigating agency, so as to enable the investigating agency to make further investigation in the case as desired. So understood, even if the subject application as filed by the then investigating agency before the lower Court makes no reference to any specific provision of law even so it is not a case of no jurisdiction to consider such application or to grant the said relief. If such direction were to be granted and the Respondents resisted or refused to co-operate, the

consequence therefor is provided under Section 6 of the Act of 1920. This obviously may be in addition to the adverse inference that can be drawn against the obstinate Accused. Section 6 of the said Act reads thus:

> "**6.Resistance to the taking of measurements, etc.**-(1) If any person who under this Act is required to allow his measurements or photograph to be taken resists or refuses to allow the taking of the same, it shall be lawful to use all means necessary to secure the taking thereof.
>
> (2) Resistance to or refusal to allow taking of measurements or photograph under this Act shall be deemed to be an offence under Section 186 of the Indian Penal Code, 1860".

15. It is appropriate to advert to the dictum of the Apex Court in **State of Bombay vs. Kathi Kalu Oghad (Supra)**. In Paragraph 10 of this decision, it is observed that no obstacles can be put in efficient and effective investigation into crime and of bringing criminals to justice. It is further observed that it is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of Law and the law Courts with legitimate powers to bring offenders to justice. To my mind, therefore, the

Petitioner cannot be non-suited merely because no specific provision has been referred to in the subject application filed before the lower Court. Any other approach would defeat the ends of justice.

16. Even the other technical objection taken on behalf of the Respondents that the earlier order passed by the lower Court on the application preferred by the Assistant Commissioner of Police and Investigating Officer, Stampit, Bangalore would bind the Petitioner, as it was allowed to become final, does not commend to me. In the first place, the earlier application, was undisputedly filed by some other agency, engaged in investigation of case pending in another State, and not for and on behalf of the investigating agency of State of Maharashtra or Central Bureau of Investigation. Therefore, that cannot be the basis to non-suit the Petitioner. At any rate, assuming the said order will bind the Special Judge, but as the matter is in appeal before the superior Court, it is always open to the superior Court to examine the correctness of such a decision (see 1977 (2) SCC

155 (Para 15) Jasraj Inder Singh's case). It is seen that in the earlier order dated 30th September 2003, the lower Court merely observed that the accused were not willing to give sample voice. I have already dealt with this aspect in the earlier part of this Order that willingness of the accused is of no consequence.

17. Even the last argument canvassed on behalf of the Respondents that the stated telephonic tape conversation has been recorded during the investigation in relation to another offence registered in State of Karnataka and cannot be relied does not commend to me. As presently advised, I find substance in the argument of the Petitioner that such evidence can be used in both the cases being common to both. However, I refrain from expressing any final opinion on this plea as, to my mind, the question of admissibility thereof, can be appropriately considered by the Trial Court as and when the occasion arises. Suffice it to observe that this ground is not relevant to consider the limited relief claimed by the investigating agency at this stage of the

proceedings in the subject application Exhibit 156.

18. Insofar as the reasons recorded by the lower Court in the impugned order, the same cannot be sustained. The first reason that similar application filed by Karnataka Police is already dealt with in the earlier part of this Order. The second reason that there are voice experts who can easily concoct or tamper the voice of any person or the third reason that the accused can also change their voice, if they are compelled to give voice sample or the fourth reason that it will be difficult for the expert to record the voice sample under compulsion, all these reasons are not germane to consider the limited relief claimed in the subject application Exhibit 156. Those matters may be relevant at the trial, depending upon the nature of evidence adduced before the Court so as to rule on the admissibility of that evidence. The next reason weighed with the Trial Court that as the accused were unwilling to give their voice samples, adverse inference can be drawn. It is rightly pointed out by the Counsel for the petitioner that the said observation is made in the context of

provision specified in the Prevention of Terrorists Activities Act, 2002, which is absent in the special enactment under which the accused are being tried. Indeed, the question of adverse inference will arise only when the investigating agency in the first place, was permitted to take the sample voice of the accused as prayed by them and the accused, in turn, were to resist or refuse. Taking any view of the matter, the impugned decision of the lower Court cannot be sustained.

19. For the reasons recorded hereinbefore, I have no hesitation in allowing the Writ Petition in terms of prayer clause (a) by setting aside the order which is impugned in this Petition and instead, allowing the application as filed being Exhibit 156 in Special Case No.2 of 2003. Rule made absolute on the above terms.

20. Issuance of certified copy is expedited.

A.M.KHANWILKAR, J.